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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH PEDRO GLORIA, Defendant and Appellant.	D074453 (Super. Ct. No. RIF1605718)

APPEAL from a judgment of the Superior Court of Riverside County, Jean P. Leonard, Judge. Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Randall Einhorn and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Joseph Pedro Gloria was found guilty of three counts of resisting an executive officer (Pen. Code, § 69)[1] and one count of striking a police dog with force likely to produce injury, a misdemeanor (§ 600, subd. (a)). Gloria waived his right to a jury trial on prior conviction allegations and admitted that he had three prior convictions for which he had served a term in prison (§ 667.5, subd. (b)) and that were also prior strike convictions (§§ 667, subds. (c) & (e)(2)(A); 1170.12, subd. (c)(2)). The trial court sentenced him on July 10, 2017, to a total term of seven years in prison. Gloria filed a timely notice of appeal.

Gloria claims that the trial court erred in failing to grant a mistrial after a testifying officer said that Gloria was arrested for homicide as a juvenile, the state wanted Gloria back in prison, and parolees tend to run from law enforcement. He also claims the trial court erred in failing to instruct the jury on a lesser included offense and requests our review of the deputies' personnel files. We affirm the judgment.

BACKGROUND

On November 22, 2016, Gloria's mother, Lillie P., called for an ambulance to remove Gloria from her home in Moreno Valley because he was possibly under the influence of methamphetamine and acting erratically. The dispatcher sent out a call for sheriff's deputies to respond. The dispatcher said that the defendant was possibly under the influence of methamphetamine, might fight with the police, and was a parolee at large with an outstanding warrant for his arrest. Riverside Sheriff's Deputy Scott Anderson

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1 Further statutory references are to the Penal Code unless otherwise specified.

responded first. He spoke with Gloria's mother and his brother, Richard. They told Anderson that Gloria had fought with law enforcement officers during previous arrests. They said there were several children inside the house and there were firearms locked in a safe. Anderson called for backup because he believed Gloria was potentially violent. Deputies Norman Cenizal and Jason Santisteven responded. Santisteven brought his canine partner, Ozzi.

Santisteven and Ozzi led the way into the house with Anderson and Cenizal following. Another deputy was sent to watch the back of the house in case Gloria fled. The deputies went upstairs and called into the master bedroom, warning that a dog would be sent in if Gloria did not come out peaceably. The bedroom was empty. The bathroom door was closed. Santisteven walked up to the bathroom door, gave another warning about the canine and ordered Gloria to come out. Gloria said he would not come out until he was finished using the toilet. Santisteven waited a few minutes, then gave Gloria a final warning to come out. Gloria opened the door, still sitting on the toilet, and said he was not finished. Santisteven told him to come out, or he would send the dog in to bite Gloria. After a few more seconds, Gloria stood up, pulled up his pants and walked to the doorway. After repeated commands to get on the floor, Gloria complied. Anderson activated his body camera after Gloria was on the ground.[2]

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2 The video was shown to the jury.

Santisteven told the other deputies to handcuff Gloria. Gloria started to stand up. Ozzi was trained to bite and "hold" when a suspect moved. Santisteven released Ozzi. Ozzi bit down on Gloria's shoulder and held on. Gloria screamed in pain. He grabbed Ozzi's face and punched him several times with substantial force. Anderson commanded Gloria to stay down. When the deputies tried to pull Gloria's hands behind his back to handcuff him, Gloria resisted. Cenizal tried to grab Gloria's hand to stop him from hitting Ozzi. Gloria reached for Cenizal's arm. Gloria then rolled over and sat up, causing Cenizal to fall on his back. Cenizal got on Gloria's back and punched him in the head. Gloria bit Cenizal's lower leg. Gloria wrapped his arms around Santisteven's waist and tried to pull himself up. He punched Santisteven in the abdomen. Santisteven punched him back. Santisteven eventually got on Gloria's back and punched him several times. Once the officers had subdued Gloria, Santisteven ordered Ozzi to release Gloria. Santisteven inspected Ozzi, who seemed to have no injuries.

During the struggle a mirrored closet door shattered, and a shard cut Cenizal's arm. In addition, Cenizal had a swollen hand and a bite on his leg. Santisteven's knuckles were scraped and painful from repeatedly punching Gloria.

Because Gloria was bleeding profusely, he was taken to the emergency room. The doctor who treated Gloria testified that Gloria had a broken nose, a facial fracture, a chipped tooth and seven superficial lacerations which required 11 stitches.

Lillie P. and Richard both testified on Gloria's behalf. Lillie said she originally called for an ambulance for Gloria because he was acting erratically, and Richard had told her that Gloria had stopped breathing. Both told the deputies that Gloria was strong and might need to be restrained but denied saying that that he might resist.

Gloria testified. He admitted that he had used methamphetamine that day. He said he was sick and vomiting all day. At one point he had trouble breathing. He went into the bathroom, then heard the officers telling him to come out and heard the dog barking. He told the officers he would come out when he finished. He left the bathroom after a few minutes with his hands raised and lay down on the floor. Gloria testified that Santisteven released the dog on him even though he had not moved or flinched. But he also said that he got back down on the floor after Ozzi bit him.

Gloria described being bitten on his shoulder by Ozzi. He also said an officer climbed on his back and punched him. Gloria said he tried to get up only to avoid the punches and the dog. He denied biting Cenizal and said that Cenizal hit Gloria's mouth with his knee, chipping one of his teeth. He denied hitting Ozzi. Gloria said he did not intend to hit the officers but might have inadvertently in his efforts to get away from the dog. He said he complied with all orders and did not fight back, bite or hit any of the officers.

Gloria acknowledged that he had a prior conviction in 1993 for a violent offense committed when he was 15 years old. He was convicted in 2007 and in 2014 for making criminal threats, and in 2010 for assault with a firearm. He was on parole at the time of this offense and there was an outstanding warrant for him.

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion When It Denied Gloria's Motion for New Trial*

Gloria contends that the trial court erred in denying his motion for new trial after Anderson mentioned in testimony that Gloria had been arrested for homicide when he was a juvenile. We conclude that the trial court did not abuse its discretion in denying the motion. Further, because the evidence of Gloria's guilt was overwhelming, any error was harmless.

a. *Proceedings Below*

The trial court ruled in limine that the deputies could testify about the information they received that Gloria was possibly under the influence of methamphetamine, that he was a parolee at large, and that there was a felony warrant for his arrest. The court stated that if Gloria testified, he could be impeached with his prior felony convictions from 2007, 2010, and 2014. The court said it probably would not permit impeachment with his felony juvenile conviction, because Gloria was "a kid" and the conviction was in 1993, more than 20 years earlier.[3] Prior convictions would not be used in the case-in-chief under Evidence Code section 1101.

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3 The probation report shows that the juvenile conviction was for voluntary manslaughter (§ 192, subd. (a)).

Anderson testified that when he asked Lillie and Richard why they thought Gloria might be violent, they told him that Gloria had fought with law enforcement officers before and had a juvenile arrest for homicide. Defense counsel objected. The trial court sustained the objection and struck the testimony. Anderson acknowledged that he did not know if it was true that Gloria had been arrested for homicide.

Anderson testified he called for backup because, "When you find out that the individual's a parolee at large, it gives us two indicators especially for a violent offense. Somebody wants him to go back to prison. And the state is pretty much what that means, the state wants him to go back to the state prison." The trial court raised its own objection and struck the last two sentences. Anderson also said, "In my experience persons on parole that don't want to be contacted will run." The court excused the jury to discuss Anderson's testimony with the prosecutor and defense counsel.

Defense counsel moved for a mistrial based on all of these statements made by Anderson. Her primary concern was that the jury would think Gloria was a killer on the loose due to the mention of the homicide. The trial court considered the motion for mistrial carefully and denied it. The court stated Anderson had violated an in limine ruling not to mention the homicide, but his comments were stricken from the record. Santisteven had already testified that he sent a deputy to the back of the house to catch Gloria if he ran away. The jury knew that Gloria had been convicted and had spent time in prison, was on parole and had a felony warrant for his arrest. These admitted facts were very detrimental to Gloria. The additional improper evidence did not prejudice Gloria beyond the facts that had been properly admitted.

Later, before Gloria testified, the prosecutor asked for clarification of the felonies that could be used for impeachment. The court stated Gloria could be impeached with his 1993 juvenile conviction and with his felony convictions in 2007 and 2014 for making criminal threats and in 2010 for assault with a firearm. The court found the 1993 juvenile conviction relevant because it was related to violence, but mistakenly said it had always ruled in favor of admitting that conviction. The conviction was sanitized to "a conviction for a juvenile violent offense," and Gloria said he was 15 years old when it occurred.

The court instructed the jury to disregard testimony that was stricken from the record and questions to which objections were sustained. It instructed the jury a second time not to consider evidence that was stricken, along with an admonition that evidence admitted for a limited purpose could be considered only for that purpose. In closing argument, neither attorney mentioned Gloria's prior convictions, a propensity to run, or the state's desire to have Gloria back in prison.

b. *Standard of Review*

In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. " 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.]" (*People v. Chavez* (2018) 22 Cal.App.5th 663, 706 (*Chavez*).) " 'A motion for a mistrial should be granted when " ' "a [defendant's] chances of receiving a fair trial have been irreparably damaged." ' " ' [Citation.]" (*Ibid.*)

c. *Analysis*

Anderson made three statements that were potentially prejudicial. None of the statements was relevant to this case. One was that parolees at large were likely to run. Other evidence showed that a deputy was sent to the back of the house to watch for Gloria in case he fled. Whatever Anderson thought, Gloria did not run from the officers. Anderson also said that the state wanted Gloria back in prison. This was known by testimony that Gloria was a parolee at large with an active felony warrant for his arrest. Improper evidence that duplicates evidence properly before the jury does not warrant a mistrial. (*People v. Dement* (2011) 53 Cal.4th 1, 40, overruled in part on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

The most potentially prejudicial comment by Anderson was that Gloria had been arrested as a juvenile for homicide. But other factors mitigated possible prejudice from that evidence. Gloria was 39 years old at the time of trial. He had committed the juvenile crime 24 years earlier, when he was 15. A reasonable jury would infer he had already been punished for that crime. Moreover, he admitted he had been convicted of a violent offense as a juvenile.

The impact of the evidence was minimized because Anderson's comments were brief and were not ever mentioned again. (*People v. Edwards* (2013) 57 Cal.4th 658, 702–704 [curative instructions adequate to dispel prejudice when evidence was isolated and fleeting].) Importantly, the trial court struck Anderson's statements and twice instructed the jury not to consider matters that had been stricken. We presume that jurors follow the instructions of the court in the absence of evidence that suggests otherwise.

(*People v. Martinez* (2010) 47 Cal.4th 911, 957; *People v. Waidla* (2000) 22 Cal.4th 690, 725.) Gloria has not rebutted the presumption here.

Further, the verdict was supported by strong evidence. As stated in Gloria's opening brief, "[Gloria's] entire defense was that the deputies used excessive force in arresting him, and any retaliatory force he used was in reasonable self-defense after he was bitten by the police dog. . . . . The major dispute concerned the exact timing of what occurred next, i.e., whether the police dog bit down on appellant's shoulder because of a minor flinch or whether, as the deputies claim, [Gloria] either 'popped up' or was just beginning to stand up when Ozzi . . . latched onto his shoulder." Gloria denied moving before Ozzi bit him, but also said twice that he got back down on the floor after Ozzi bit him. He therefore admitted that he was getting up before Ozzi bit him. The jury saw the witnesses and the video and based its finding on its own observations of Gloria, Ozzi, and the officers, not on an emotional bias against Gloria for his juvenile crime.

We conclude the trial court did not abuse its discretion in denying Gloria's motion for a mistrial. The trial court was in the best position to determine if any prejudice was incurable by admonition or instruction, and determined it was not. (*Chavez, supra*, 22 Cal.App.5th at p. 706.) We can find no reason to overturn its ruling. Anderson's improper statements did not result in a miscarriage of justice or deny him his constitutional right to a fair trial. (See *id*. at p. 707, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) and *Chapman v. California* (1967) 386 U.S. 18, 24.)

2. *The Trial Court Erred in Failing to Instruct the Jury on the Lesser Included Offense of Simple Assault, But the Error Was Harmless*

Gloria contends, and the People concede, that the trial court should have instructed the jury on the lesser included offense of simple assault. The People argue the error was harmless. After review, we accept the People's concession and conclude that the trial court erred in failing to instruct the jury on the lesser included offense of simple assault. We further conclude the error was harmless.

The trial court instructed the jury with the lesser included offense of misdemeanor resisting arrest (§ 148), in addition to resisting an executive officer with force or violence (§ 69). (See *People v. Smith* (2013) 57 Cal.4th 232, 244–245 (*Smith*) [misdemeanor resisting arrest is lesser included offense when both ways of violating § 69 are alleged].) Gloria did not request instructions on any other lesser offenses. Nonetheless, the trial court has a sua sponte duty to instruct the jury on all lesser offenses that are necessarily included in the charged offense, when there is substantial evidence that could support a finding that the defendant committed only the lesser offense. (*Id*. at p. 240.) " ' " 'Substantial evidence' in this context is " 'evidence from which a jury composed of reasonable [persons] could . . . conclude[]' " that the lesser offense, but not the greater, was committed.' [citations]." ' " (*People v. Brown* (2016) 245 Cal.App.4th 140, 153 (*Brown*).) This duty does not exist when the evidence shows that if the defendant was guilty, he was guilty only of the greater offense. (*Smith*, at p. 240.)

The court in *Brown* recently discussed assault as a lesser included offense of resisting an executive officer with force. (*Brown, supra*, 245 Cal.App.4th at pp. 152–154.) Assault (§ 240) is not a lesser included offense of resisting an executive officer (§ 69) under the statutory elements test because section 69 can be violated by either (1) attempting to deter an officer by threats or violence, *or* (2) resisting an officer by use of force or violence.[4] A person could violate section 69 without committing an assault by the first manner, i.e., use of threats. But the accusatory pleading here, as in *Brown*, charged the defendant with attempting to deter an officer by means of threat and violence, *and* resisting the officer by use of force and violence. Because the information used "and," instead of "or," for the two separate methods of violating section 69, assault is a necessarily included lesser offense because a defendant cannot resist an officer by use of force and violence without attempting the use of force or violence. (*Brown*, at p. 153; see also *Smith*, *supra*, 57 Cal.4th at pp. 244–245 [similar analysis].) We therefore accept the People's concession and conclude that simple assault was a lesser included offense here.

We differ from *Brown*, however, in concluding that the error in failing to instruct on the lesser included offense was harmless here because there was no substantial evidence that Gloria committed only an attempt to commit a violent injury on the officers. The only direct evidence of Gloria's state of mind came from his testimony. He

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4 Section 69, subdivision (a) punishes "[e]very person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty . . . ."

said that he never intended to hit the officers, although he might have done so inadvertently when trying to get away from the dog. Assault requires an intentional act. (*People v. Malik* (2017) 16 Cal.App.5th 587, 598.) Gloria denied having the intent to commit an assault.

The *Brown* court cautioned, however, not to rely on a witness's testimony because the jury might have believed some parts of the testimony but not others. (*Brown, supra,* 245 Cal.App.4th at pp. 153–154.) In *Brown,* the defendant and the officers gave conflicting versions of the defendant's resisting of the officers. The court determined that the jury could have believed some part of the defendant's version and some parts of the officers' testimony, resulting in a finding that the officers initiated the confrontation with excessive force, but the defendant used excessive force in response, resulting in an assault conviction. (*Id.* at p. 154.)

The officers here used excessive force only if the dog bit Gloria before he moved, while he was complying with the officers' commands not to move. Unlike *Brown,* the jury here had eyewitness evidence because it watched the video of the confrontation. After hearing the testimony and seeing the confrontation, it determined beyond a reasonable doubt that the officers did not initiate the incident with excessive force.[5]

The failure to instruct on a lesser included offense in a noncapital case is an error of state law only. (*Brown, supra,* 245 Cal.App.4th at p. 154.) The error is reversible only

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[5] The jury had the option of considering a lesser offense, misdemeanor resisting arrest. The court instructed the jury that it could consider the offenses in any order, but that it could find the defendant guilty of the lesser offense only if it first found the defendant not guilty of the greater crime.

if there is a reasonable probability that the defendant would have achieved a more favorable result in the absence of the error. (*Watson*, *supra*, 46 Cal.2d at p. 836.) Under the facts and evidence of this case, we conclude there is no reasonable likelihood that Gloria would have achieved a more favorable result even if the jury had been instructed on simple assault.

3. *The Court Did Not Err in Denying Gloria Access to the Officers' Personnel Records*

Gloria filed a motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) to determine whether the three officers' personnel files revealed complaints against them or discipline imposed on them. The trial court reviewed the personnel files in camera and ordered the proceedings sealed. The trial court found no records responsive to the motion requiring disclosure.

Gloria asks us to independently review the sealed *Pitchess* proceedings to determine whether the trial court complied with the proper procedure in concluding there are no discoverable materials in the officers' files. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1226, 1228.) We review the trial court's *Pitchess* ruling under the abuse of discretion standard. (*Id*. at p. 1228.) The Attorney General has no objection to our review.

After independently reviewing the sealed *Pitchess* documents, we find the trial court complied with the proper procedure and did not abuse its discretion when it found there were no discoverable materials in the officers' personnel files.

DISPOSITION

We affirm the judgment.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

AARON, J.